

No. 88-357

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IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES  
**OCTOBER TERM, 1988**

NORM MALENG, King County Prosecuting Attorney;  
AMOS E. REED, Secretary of the Washington State  
Department of Social & Health Services; KENNETH  
O. EIKENBERRY, Attorney General,

*Petitioners,*

v.

MARK EDWIN COOK,

*Respondent.*

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIEF OF PETITIONERS**

**KENNETH O. EIKENBERRY**  
*Attorney General*

**JOHN M. JONES**  
*Assistant Attorney General*

**WILLIAM L. WILLIAMS**  
*Counsel of Record*  
*Senior Assistant Attorney*  
*General*

Department of Corrections  
Mail Stop: FZ-11  
Olympia, WA 98504  
(206) 586-1445

**QUESTIONS PRESENTED**

1. Does the District Court have subject matter jurisdiction over a § 2254 challenge to a state court criminal conviction when the sentence involved has expired although the conviction may have been used to enhance a subsequent unrelated state minimum term setting or in setting a subsequent federal prison term?

## LIST OF PARTIES

All parties to this proceeding are listed in the case caption.

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### OPINIONS BELOW

The Opinion filed on June 2, 1988, by the United States Court of Appeals for the Ninth Circuit, reversing and remanding for further proceedings, is found at *Cook v. Maleng*, 847 F.2d 616 (9th Cir. 1988) and appears in the Petition for Writ of Certiorari at Appendix A. The Order of the United States District Court for the Western District of Washington adopting the Magistrate's Report and Recommendation and dismissing Mr. Cook's petition for writ of habeas corpus for lack of subject matter jurisdiction appears in the Petition for Writ of Certiorari at Appendix B. The Magistrate's Report and Recommendation appears in the Petition for Writ of Certiorari at Appendix C.

## JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Petition for Writ of Certiorari was filed with this Court on August 27, 1988. This Court granted the Writ of Certiorari on November 7, 1988.

## STATUTORY PROVISION INVOLVED

The Habeas Corpus statute regarding remedies in Federal courts for petitioners in State custody, 28 U.S.C. § 2254 appears in the Petition for Writ of Certiorari at Appendix D.

## STATEMENT OF THE CASE

Respondent, Mark Edwin Cook, is currently serving a thirty year federal sentence for bank robbery and conspiracy. In 1958, a jury in Washington state court convicted Mr. Cook of three counts of robbery (the 1958 crimes). He was sentenced to three concurrent twenty year terms of imprisonment and was thereafter paroled in 1962.

While on parole in 1965, Mr. Cook was again convicted in Washington state court of three counts of robbery, and sentenced to three concurrent fifty year terms (the 1965 crimes). He was then again paroled in 1973. In 1976, while on parole, Mr. Cook was convicted of the federal crimes leading to his current incarceration (the federal crimes).

Mr. Cook was also convicted in Washington State court in 1976 of two counts of first degree assault and one count of aiding a prisoner to escape (the 1976 state crimes). The Washington state court thereafter<sup>1</sup> sentenced Mr. Cook to two life terms and one ten year term of imprisonment. These sentences were maximum terms in Washington's then indeterminate sentencing scheme, with the minimum terms to be set by the Board of Prison Terms and Paroles.<sup>2</sup> Since Mr.

<sup>1</sup>Sentencing on Mr. Cook's 1976 state crimes did not take place until 1978 — thus his sentence is referred to in this brief as the 1978 sentence.

<sup>2</sup>The Board is now called the Indeterminate Sentence Review Board. RCW 9.95.009(1).

Cook had prior felony convictions, his minimum term on his 1978 state sentence was required to be set longer than would otherwise be the case.<sup>3</sup> Because Mr. Cook could not serve that sentence until his release from federal prison, the State of Washington has placed a detainer against him requesting federal prison authorities to notify the State when Mr. Cook's federal term expires.

In 1985 — twenty-seven years after his 1958 conviction and seven years after the expiration of his sentence thereon — Mr. Cook filed the instant federal habeas petition, pursuant to 28 U.S.C. § 2254, challenging that 1958 conviction. He alleged that his 1958 conviction was illegal because he was never given a competency hearing in 1958, and that its use to enhance both his 1976 federal sentence and 1978 state sentences therefore was also illegal.

The District Court granted the state's motion to dismiss the petition for lack of subject matter jurisdiction holding that Mr. Cook was not "in custody" on his 1958 conviction since the maximum sentence had expired prior to the filing of his petition. Mr. Cook then filed a timely notice of appeal and the circuit court issued a certificate of probable cause.

In examining Mr. Cook's petition, the circuit court found that the 1958 conviction might have lengthened his 1978 minimum term<sup>4</sup> by as much as seven and one-half years.<sup>5</sup>

<sup>3</sup>RCW 9.95.040(2) requires the Board to set a minimum term of at least seven and one-half years for a person previously convicted of a felony (as Mr. Cook had been in both 1958 and 1965) who was armed with a deadly weapon at the time of the commission of his offenses (as Mr. Cook was at the time of his 1976 crimes). Had he not been armed, his mandatory minimum term would be five years, based on having previously been convicted of at least one felony. RCW 9.95.040(1). In any event, RCW 9.95.040(4) gives the Board the authority to waive Mr. Cook's mandatory minimum term and parole him prior to such term's expiration. RCW 9.95.040 is set forth in the Petition for Writ of Certiorari at Appendix E.

<sup>4</sup>Mr. Cook has made no contention that the 1958 conviction has in any way affected his maximum term.

<sup>5</sup>This is an incorrect statement of Washington law. RCW 9.95.040 required Mr. Cook's minimum term to be set at five years due to his use of a deadly weapon in the course of committing the crimes for which he was sentenced in 1978. His prior felony conviction required this minimum term to be increased two and one-half years for a total of seven and one-half years. Mr. Cook would have been subject to this two and one-half year

This at most collateral consequence of the expired 1958 conviction upon the 1978 minimum term led the circuit court to find that Mr. Cook was still "in custody" on the 1958 conviction and that therefore the district court did have subject matter jurisdiction to entertain Mr. Cook's petition. Petitioners herein challenge the Ninth Circuit's holding that such a collateral consequence is enough to meet the "in custody" requirement of 28 U.S.C. §2254(a).<sup>6</sup>

### SUMMARY OF ARGUMENT

The effect of the Ninth Circuit's opinion is to substantially undercut the notion of finality of criminal judgments and interfere with a state's ability to construct a criminal justice system which utilizes prior criminal behavior as a distinct element at criminal sentencings. To expand federal habeas jurisdiction as the Ninth Circuit has done aggravates the concerns of finality and comity which this Court has previously recognized.

The rule adopted by the Ninth Circuit enables an offender, who has embarked on a criminal career spanning more than thirty years, to now go back and challenge his early convictions in hopes of lessening his period of confinement on one or more subsequent, unrelated convictions. The state submits that this is not "substantial justice." Neither the history of the Great Writ nor this Court's prior decisions stand for such an abuse where, as here, the offender had two decades to present this issue to a federal court while still in custody, but failed to do so.

increase regardless of the 1958 conviction because of his 1965 felony convictions.

Petitioners concede that Mr. Cook may well have other remedies available. Under state law, the Washington Rules of Appellate Procedure, 16.3-16.15, allow Mr. Cook to challenge his 1958 conviction by way of a personal restraint petition. If Mr. Cook's challenge is thereafter successful, then *State v. Ammons*, 105 Wn.2d 175 (1986) guarantees Mr. Cook a new sentencing where the 1958 conviction will not be considered. Other remedies — including a writ of error coram nobis — are no doubt available in other jurisdictions. See, for example, *United States v. Morgan*, 346 U.S. 502 (1954) (enactment of § 2255 — a companion provision to § 2254 for persons in custody under federal court orders — did not deprive the federal trial court of jurisdiction to entertain an application for a writ of error coram nobis).

This Court's early cases construed the "in custody" requirement for habeas corpus jurisdiction to mean actual confinement or the present means of enforcing confinement. Although later cases adopted a somewhat more liberal view of the degree of restraint necessary to constitute custody, these cases followed a common line of reasoning. The habeas petitioner was under some restraint stemming directly and continuously from the conviction the petitioner sought to attack by way of federal habeas corpus. The indirect collateral consequences of Mr. Cook's 1958 conviction should not be substituted for the "custody" necessary for jurisdiction in a federal habeas proceeding.

This Court should state in explicit terms that which was implicit in *Carafas*: that is, collateral consequences of a conviction, where sentence has expired prior to filing of the petition, are no substitute for the statutory "in custody" requirement necessary for subject matter jurisdiction in a federal habeas proceeding. This Court should draw a "bright line" and resolve the split in the circuits by dismissing Mr. Cook's petition for lack of subject matter jurisdiction in this federal habeas proceeding.

### ARGUMENT

#### 1. Introduction

This case involves the scope of the federal court's jurisdiction to review state court criminal convictions under 28 U.S.C. § 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody pursuant to the judgment of a state court* only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States. *Id.* (Emphasis added).

The question presented here is whether a person convicted of a criminal offense in state court can be considered "in custody" for § 2254(a) jurisdictional purposes after the sentence imposed for that offense has been served.

The Ninth Circuit's decision below grants § 2254 subject

matter jurisdiction to challenge an expired conviction any time that conviction is used to enhance a subsequent unrelated criminal sentence. The Ninth Circuit's holding essentially means that state court convictions can never be considered final.

Under that holding, custody on the actual conviction under attack is no longer necessary for habeas jurisdiction and the definition of custody is only limited by the extent of the petitioner's subsequent criminal career.

If the jurisdictional "custody" requirement of § 2254(a) is to be meaningful, it cannot be satisfied by indirect, collateral effects of an expired conviction upon a subsequent unrelated sentence. To hold otherwise would unduly burden the states with the obligation to relitigate criminal judgments, based upon stale claims, years after trial when records have been lost and memories dimmed by the passage of time. Such a treacherous path is not dictated by common sense or this Court's prior decisions.

The Ninth Circuit's liberal expansion of the custody requirement allows a career criminal to file a habeas petition after restraint has expired when the state has great difficulty in responding. Such "sandbagging" has consistently been condemned by this Court in other contexts.<sup>2</sup> It should not be encouraged in this context.

This Court should hold that "custody" exists only if it is an uninterrupted meaningful restraint stemming directly from the conviction under attack. When an offender is no longer serving a sentence, then that offender should not be considered "in custody" for federal habeas jurisdictional purposes.

This Court should reverse the Ninth Circuit decision and hold that once the sentence for a conviction has been served, the convicted felon cannot be considered "in custody" for habeas jurisdiction purposes, even though the existence of

<sup>2</sup>See, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Murray v. Carrier*, — U.S. —, 106 S.Ct. 2639 (1986).

that conviction is used to enhance a sentence imposed as a result of a subsequent unrelated conviction.

## **2. The Jurisdictional Reach of Federal Habeas Corpus Should Not Be Expanded So As To Further Erode the Concept of Finality or to Interfere With the Establishment and Operation of State Criminal Justice Systems.**

In defining the scope of federal habeas jurisdiction, the court must consider not only the historical role of the Great Writ as "a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126, (citation omitted). Also to be born in mind are the tremendous societal costs entailed by the broad exercise of the court's habeas jurisdiction.

One of the most traumatized victims of the expansive use of habeas jurisdiction is the notion that at some point a criminal conviction can be considered final. Justice O'Connor, in *Engle, supra*, quoted with approval this observation by Justice Harlan:

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community. *Sanders v. United States*, 373 U.S. 1, 24-25, (dissenting opinion).

*Engle v. Isaac*, 456 U.S. at 127.

The effect of such continuing re-examination of state court criminal convictions is to undercut the credibility and effectiveness of our judicial system. As Justice Powell has observed:

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation.

*Schneekloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (concurring opinion).

The Ninth Circuit's liberal interpretation of the "in custody" requirement for federal habeas jurisdiction aggravates these very concerns. Under its ruling, a conviction never becomes final and the legitimate interest a state has in structuring a sentencing system to include consideration of prior criminal conduct may be thwarted.

Effective July 1, 1984, Washington began utilizing what is generally known as a determinate sentencing system, under its Sentencing Reform Act, RCW 9.94A. Under that statute, persons convicted of crimes committed on or after July 1, 1984, are sentenced according to a series of standard sentencing ranges. The range for a particular offense committed by a particular offender is determined by reference to a statutory matrix which takes into account the seriousness level of the offense and the prior criminal history of the offender. RCW 9.94A.310.<sup>8</sup>

Other states have adopted similar sentencing schemes.<sup>9</sup> While the wisdom of such a sentencing plan may be subject to debate as a policy matter, the federal courts' exercise of its habeas jurisdiction should not interfere with the legitimate interests states have in establishing and operating their criminal justice systems.

<sup>8</sup>Offenders convicted of crimes committed prior to July 1, 1984, including, for example, Mr. Cook's unserved 1978 sentence, remain subject to the jurisdiction of the Indeterminate Sentence Review Board. The Board is required to "consider the purposes, standards and sentencing ranges" of the Sentencing Reform Act when making decisions on duration of confinement and parole release. RCW 9.95.009(2). See also, *In re Myers*, 105 Wn.2d 257 (1986) and *Addelman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503 (1986).

Thus, under current Washington law, the length of the prison sentence actually served by all felony offenders is directly related to those offenders' prior criminal records.

<sup>9</sup>See, California Penal Code § 1170; Delaware Code Annotated Title 11, Chapter 42; District of Columbia Court Rules 32; Florida Statutes Annotated, Chapter 921; Annotated Code of Maryland, Rule 4-342, 4-343; Annotated Laws of Massachusetts § 279; Michigan Statutes Annotated § 28; Minnesota Statutes Annotated § 244 App.; Purdon's Pennsylvania Forms § 42; General Laws of Rhode Island § 12-19; Utah Code Annotated § 77; Vermont Revised Criminal Procedure 32; Wisconsin Statutes Annotated, Chapter 973.

Justice O'Connor has written of the "special costs" which the expansive use of the habeas writ imposes on the concept of federalism:

The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

*Engle, supra*, at 129. (Citation omitted).

Yet, if the Ninth Circuit decision stands, the ability of Washington and other states to rely on prior criminal history as an element in their respective sentencing schemes will be frustrated, since the individual convictions will thereby become subject to federal habeas corpus challenge.

Such a further federal intrusion into what is clearly within the province of the states would be unwarranted. Further, the state prosecutorial authorities charged with administering the criminal justice system are faced with several practical problems if this Ninth Circuit opinion is allowed to stand. Aside from the difficulty of reconstructing the record of a 1958 conviction in order to allow the federal court to review that conviction, the prosecutor must also consider the difficulty of retrying Mr. Cook if the federal court were to grant the writ as to his 1958 conviction. Not only will witnesses and other evidence likely be difficult to locate, the practical exigencies of prosecutors' day-to-day workload dictate against committing resources for retrial of an offense for which the maximum sentence has already been served.

Even more problematical is a prosecutor's reliance on prior convictions from another state as a sentence component for the current case.<sup>10</sup> If, in such a situation, federal habeas jurisdiction were allowed to attach to the prior conviction, then Washington will have the burden of responding to a

<sup>10</sup> RCW 9.94A.360(2) authorizes the use of prior convictions from other states as criminal history for purposes of applying the sentence matrix in a current case.

habeas challenge to such out of state convictions, notwithstanding the difficult task of obtaining court records and witnesses from out of state.

Moreover, if for whatever reason that prior conviction is overturned, the current prosecutor may have a substantial interest in having that crime reprosecuted, but no ability to effectuate that interest.<sup>11</sup>

It is undisputed that Petitioner has another avenue of relief under *State v. Ammons*, 105 Wn.2d 175 (1986). In the type of proceeding contemplated there it is he — and not the state — who has the burden of proof. Under habeas jurisdiction, the state bears the burden, even though the state has no opportunity to initiate a habeas proceeding at a time when memories are fresh and the trail of witnesses still warm.

If a petitioner delays bringing a habeas challenge until his sentence is completely served, and habeas is therefore foreclosed to him, he will be forced to pursue his state remedy. There the one responsible for the delay — and not the state — will bear the onus caused by that delay.

The effect of the Ninth Circuit opinion is to substantially undercut the notion of finality and interfere with a state's ability to construct a criminal judicial system which utilizes prior criminal behavior as a distinct element of criminal sentencing. To implement federal habeas jurisdiction as the Ninth Circuit has done aggravates the concerns which this Court has previously recognized.

### 3. The Court of Appeals' Decision in the Case at Bar Provides Career Criminals With an Incentive to Attack Their Early Criminal Convictions with False Allegations at a Time When the State May Be Unable to Refute Such Allegations Because of the Unavailability of Records and Testimony of Officials and Participants in the Trial.

Although addressing a different factual aspect of the "in

<sup>11</sup> Justice O'Connor noted: "[w]hile a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Engle v. Isaac*, 456 U.S. at 129. Such a result is, if anything, much more likely where the maximum sentence has already been served.

custody" requirement in a federal habeas proceeding, this Court made several observations in *Peyton v. Rowe*, 391 U.S. 54 (1968), that are relevant to the case at bar.

In holding that a state prisoner was in custody to attack the legality of a consecutive sentence prior to commencement of said sentence, the *Peyton* Court explained the dangers of waiting twenty years before litigating matters involving factual issues. The lengthy period of time involved prior to litigating factual issues leads to "dimmed memories or the death of witnesses [that] is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact." *Id.*, at 62. The *Peyton* Court went on to state that "postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id.* (Footnote omitted).

The *Peyton* Court was mindful of and quoted from the circuit court's analysis of the case:

Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the [state] may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could prosecute if retrials are held to be necessary.

It is to the great interest of the [state] and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established.

*Id.*, at 62-63 (citation omitted).

Under the *Peyton* court's analysis, the jurisdictional "light" goes "on" immediately after the conviction, notwithstanding the intervening sentence which must be served. To hold, as the Ninth Circuit did, that jurisdiction once lost can be rekindled by subsequent events flies in the face of the *Peyton* analysis.

In the case at bar, Mr. Cook filed his petition challenging his 1958 conviction twenty-seven years after being sentenced. The circumstances are just as predicted by the *Peyton* Court.

Mr. Cook has made factual allegations and is presumably willing to give testimonial support to these allegations. The state has been unable to locate the complete state court records or the key witnesses involved. None of the attorneys for the prosecution or the defense has any recollection of a competency issue at Mr. Cook's 1958 trial. See, CR 10 at Affidavit of Michael P. Lynch. Thus, the state will be extremely prejudiced in its efforts to answer Mr. Cook's allegation.

The rule adopted by the Ninth Circuit enables an offender, who has embarked on a criminal career spanning more than thirty years, to now go back and challenge his early convictions in hopes of lessening his period of confinement on one or more subsequent, unrelated convictions. The State submits that this is not "substantial justice." Neither the history of the Great Writ nor this Court's prior decisions stand for such an abuse where, as here, the offender had two decades to present this issue to a federal court while still in custody and failed to do so.

#### **4. The Indirect, Collateral Use of a Conviction Where the Sentence Has Expired, is too Attenuated to Constitute the Custody Necessary for Federal Habeas Corpus Jurisdiction.**

The general nature of the habeas corpus writ from the time of its common law origin was to provide a remedy for the unlawful imprisonment of an individual. *Stone v. Powell*, 428 U.S. 465 (1976). As a direct result, the statutes governing federal habeas corpus and the rules that were enacted to enforce that procedure were consistently drafted to provide relief by way of a habeas corpus petition only to a person who is "in custody". See, 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a)(b)(d); § 2254, Rule 1(a)(1-2); § 2254, Rule 2(a) and (b).

It is apparent from the early cases that the "in custody" requirement for habeas corpus was originally construed to mean actual confinement or the present means of enforcing confinement. *Wales v. Whitney*, 114 U.S. 564 (1885).

In later cases, the courts adopted a somewhat more lib-

eral view of the degree of restraint on personal liberty that is sufficient to satisfy the "in custody" requirement of § 2254.

While no longer requiring close physical confinement, these cases followed a common line of reasoning. The habeas petitioner was under some meaningful restraint stemming directly and continuously from the conviction the petitioner sought to attack by way of federal habeas corpus.

In *Jones v. Cunningham*, 371 U.S. 236 (1963), this court found a parolee to be under direct meaningful restraint of the conviction he sought to attack. The petitioner was restricted to a community or job at the sufferance of his parole officer. *Id.* at 242. He had to make periodic reports and refrain from certain activities. *Id.* Most importantly, any violation of the conditions of parole could result in his return to prison to serve the balance of his sentence. *Id.*

Mr. Jones was thus subject to direct restraints not shared by the public generally and those restraints stemmed directly — and without interruption — from the conviction he sought to attack by way of his federal habeas corpus petition.

Had the *Jones* court held otherwise, then custody would be like a light, switched "on" while petitioner was in custody initially and for any subsequent reincarceration for parole violation, but "off" during any intervening period he was released on parole.

Implicit in the *Jones* court's reasoning is that once the petitioner was no longer under the restraint of being on parole, he would not be "in custody". Thus, if Mr. Jones had filed his petition for federal habeas relief after being discharged from parole, then the federal courts would be without subject matter jurisdiction in a 28 U.S.C. § 2254 proceeding.<sup>12</sup>

Similarly, in *Hensley v. Municipal Court*, 411 U.S. 345 (1973), this court found Mr. Hensley to be under direct,

<sup>12</sup> Analysis similar to that of the *Jones* case has been applied to a person on probation. *Benson v. California*, 328 F.2d 159 (9th Cir. 1964) cert. den. 380 U.S. 951 (1965).

meaningful restraint while released on bond, although the restrictions were less than those imposed upon a parolee. His movements were restricted, he was required to appear at the demand of the court, and his incarceration was imminent because his bond could be revoked at any time. *Id.* at 352.

Once again, the *Hensley* court found the petitioner under direct "restraint not shared by the public generally." But for the bond and the stay issued by the trial court and then by this Court, Mr. Hensley would have been imprisoned as a direct result of the very conviction he sought to challenge in his federal habeas petition.

While the *Hensley* decision liberally construed the amount of restraint sufficient to constitute the "custody" necessary for federal habeas jurisdiction, the restraint involved stemmed directly and continuously from the conviction Mr. Hensley sought to challenge in his federal habeas petition. Absent that direct restraint, there would have been no federal habeas jurisdiction — the jurisdictional "light" would be switched "off", only to be switched "on" again when bond was revoked, and Mr. Hensley incarcerated.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), Mr. Carafas was "in custody" at the time he filed his federal habeas petition although he was subsequently released. This Court held that his release did not deprive the federal courts of jurisdiction over Mr. Carafas' constitutional claims. It was undisputed that Mr. Carafas was "in custody" at the time he filed his petition and that the custody stemmed directly from the conviction he was challenging in his petition.

The *Carafas* court reasoned that Mr. Carafas had met his burden of filing his petition in a timely manner. The court concluded that the delay inherent in the appellate process unfairly penalized Mr. Carafas if it resulted in the subsequent dismissal of his petition for lack of jurisdiction. In addition, the collateral consequences of his conviction — he could not vote, engage in certain businesses, serve as a union official or as a juror — prevented the case from being moot. *Id.* at 237.

Thus, the *Carafas* court held that once federal habeas

jurisdiction attaches, it will not be defeated by a subsequent release from custody. Further, the collateral consequences of a conviction keep the case in controversy so as to prevent dismissal for mootness.

The *Carafas* court *did not* hold that the collateral consequences of the conviction under attack constituted the "custody" sufficient for federal habeas jurisdiction. Implicit in the court's decision is that such collateral consequences, standing alone, would not and do not rise to the level of "custody" for habeas jurisdiction purposes. Such consequences only prevent the case from becoming moot. But for Mr. Carafas' filing of his petition while he was still in custody, he would have been without a remedy in a federal habeas proceeding due to lack of jurisdiction.

In the case at bar, Mr. Cook cannot be seen as having made the required showing of being "in custody" on the 1958 conviction he seeks to challenge in this federal habeas proceeding. It is undisputed that he failed to file his federal habeas petition until seven years after the twenty year maximum sentence expired on his conviction. Thus, he is not under direct restraint of the 1958 conviction as in the *Jones* case, nor is imprisonment imminent as in the *Hensley* case.

Mr. Cook is only being affected by the 1958 conviction because of his subsequent unrelated criminal convictions. It is Mr. Cook's further criminal activity that is the cause of his present custody. His 1958 conviction was not used as an element of his subsequent crimes nor did it affect the statutory maximum sentence to which he was subjected.

There is no question that there are and will be collateral consequences of his prior convictions that will affect Mr. Cook now and in the future. Indeed, the same may be said for any person convicted of a felony crime. Under *Carafas*, the potential effect of those collateral consequences is sufficient to prevent the case from becoming moot, if jurisdiction had attached in the first place.

However, it must be remembered that this case is not about mootness. This case involves the issue of custody for § 2254 subject matter jurisdiction. Had Mr. Cook filed his peti-

tion for federal habeas relief prior to 1978, then *Carafas v. LaVallee*, *supra*, would govern. But the *Carafas* decision did not elevate such collateral consequences to the level required to meet the "in custody" test of § 2254.

Just as Mr. Carafas' petition would have been dismissed for lack of jurisdiction absent his filing the petition prior to his release from custody, so must Mr. Cook's petition now be dismissed for lack of jurisdiction. Collateral consequences of an expired conviction do not constitute the "custody" necessary for subject matter jurisdiction.

If Mr. Cook's petition is not dismissed, then the jurisdictional light will be "on" or "off" depending upon the occurrence of events having no relationship to the conviction itself. It will be "on" whenever the 1958 conviction has a collateral consequence on subsequent custody, but then "off" whenever Mr. Cook is released from such subsequent custody. If true "custody" is not required in federal habeas proceedings, then the finality of criminal judgements will never be achieved.

Petitioners therefore assert that the indirect collateral consequences of Mr. Cook's 1958 conviction do not constitute the "custody" necessary for jurisdiction in a federal habeas proceeding. Mr. Cook failed to file his federal habeas petition when he was "in custody" on the 1958 conviction and the federal courts no longer have subject matter jurisdiction for this 28 U.S.C. § 2254 proceeding. Petitioners therefore ask this Court to order that Mr. Cook's petition be dismissed for lack of jurisdiction.

**5. This Court Should Resolve the Split in the Circuits in Favor of the Rationale Adopted by the Fourth, Sixth and Eighth Circuits Where Petitioners Similarly Situated to Mr. Cook Have Had Their Petitions Dismissed for Lack of Subject Matter Jurisdiction.**

This Court has not yet precisely addressed a federal habeas application where the petitioner, no longer subject to a direct restraint resulting from the conviction under attack, was being affected by some collateral consequence stemming

from the challenged conviction. While the circuit courts have addressed that issue, we submit that this Court should hold that the federal courts are without subject matter jurisdiction in cases where the petitioner's sentence expired prior to the filing of his application for federal habeas relief. Such a holding would be consistent with the rationale adopted by the Fourth, Sixth and Eighth Circuit Courts of Appeal.

In *Cotton v. Mabry*, 674 F.2d 701 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982), Mr. Cotton sought to challenge a 1969 conviction that had resulted in a five year sentence. Mr. Cotton had filed his federal habeas petition in 1979, at a time when he was no longer "in custody" on the 1969 conviction, because it served to prolong his two subsequent unrelated sentences.

The Eighth Circuit held in *Cotton* that the influence of the 1969 conviction on the two subsequent sentences was a collateral consequence. Relying on this Court's decision in *Carafas v. LaVallee supra*, the *Cotton* court held that such collateral consequences of a conviction only kept the case from becoming moot; they did not suffice to give the federal courts jurisdiction in a habeas proceeding. Thus, Mr. Cotton was found not to be "in custody" for purposes of federal habeas jurisdiction. *Id.* at 704.

In *Harris v. Ingram*, 683 F.2d 97 (4th Cir. 1982), Mr. Harris sought to challenge a 1978 conviction that had resulted in a twelve month jail term. Mr. Harris filed his petition for federal habeas relief, one year after his unconditional release from the 1978 sentence. Mr. Harris contended, and the Court of Appeals accepted, that the 1978 conviction enhanced his sentence and affected his eligibility for parole on a subsequent federal conviction.

The Fourth Circuit noted in *Harris* that although the statutory requirement of custody had been met in prior cases by conditions falling short of actual present physical confinement, the custody requirement had not been eliminated, citing *Carafas v. LaVallee, supra*. The *Harris* court, also relied on *Noll v. Nebraska*, 537 F.2d 967 (8th Cir. 1976), in holding that the use of a prior conviction, the sentence for which has

expired, to enhance the sentence in a subsequent conviction does not re-establish custody on the expired conviction. Thus, the *Harris* court affirmed the district court's dismissal of Mr. Harris' petition for lack of subject matter jurisdiction. *Id.* at 99.

In *Ward v. Knoblock*, 738 F.2d 134 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), Mr. Ward sought to challenge his 1971 conviction that had resulted in a state prison term. Mr. Ward filed his petition for federal habeas relief more than eight years after he had been discharged from his state sentence. Mr. Ward alleged that his 1971 conviction caused him collateral injury in that it enhanced his custody level and adversely affected his parole eligibility on a subsequent federal conviction. *Id.* at 136.

The Sixth Circuit was not unmindful in *Ward* of this Court's gradual movement towards a more liberal construction of the "in custody" jurisdictional requirement. However, the *Ward* court held that such liberalization had not gone so far as to bring within the jurisdiction of the writ a petitioner who had fully served the sentence under attack and was no longer in custody in any meaningful sense. *Id.* at 138. Again, relying on *Carafas v. LaVallee*, *supra*, the *Ward* court held that:

collateral consequences of [a] conviction may enable a petitioner who has fully served a sentence he wishes to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless, as in *Carafas* itself, federal jurisdiction has already attached.

*Id.* at 139. Thus, the district court's dismissal for lack of subject matter jurisdiction was affirmed. *Id.* at 140.

The Ninth Circuit relied upon *Anderson v. Smith*, 751 F.2d 96 (2nd Cir. 1984); *Harrison v. Indiana*, 597 F.2d 115 (7th Cir. 1979); *Lyons v. Brierly*, 435 F.2d 1214 (3rd Cir. 1970); and *Capetta v. Wainwright*, 406 F.2d 1238 (5th Cir. 1969), *cert. denied* 396 U.S. 846 (1969) as authority for its holding in the present case. See, Petition for Writ of Certiorari at A-5. These cases are distinguishable on their facts from *Cotton*, *Harris*, and *Ward*, as well as the instant case, in

that they all involved challenges to an earlier conviction made while serving a sentence consecutive to that based on the earlier conviction. On the basis that the earlier conviction affected the timing — but not the length — of the current sentence, the Second, Third, Fifth and Seventh Circuits held that petitioners were still in custody as to the earlier conviction. In such circumstances, elimination of the earlier conviction causes the time of serving the consecutive sentence to be advanced. The Ninth Circuit, in the instant case, has found custody to exist because of the enhancement effect of a prior conviction.<sup>13</sup>

This Court should state in explicit terms that which was implicit in *Carafas*: collateral consequences of a conviction, where sentence has expired prior to filing of the petition, are no substitute for the statutory "in custody" requirement necessary for subject matter jurisdiction in a federal habeas proceeding. This Court should draw a "bright line" and resolve the split in the circuits by dismissing Mr. Cook's petition for lack of subject matter jurisdiction in this federal habeas proceeding.

<sup>13</sup> Other courts have also viewed the "in custody" jurisdictional requirement in a more liberal fashion. None of these opinions are particularly illuminating. See, *Jackson v. State of Louisiana*, 452 F.2d 451 (5th Cir. 1971) (custody addressed only in dicta); *Aziz v. LeFerve*, 830 F.2d 184 (11th Cir. 1987) (relied upon *Carafas* for proposition that collateral consequences establish custody); and *United States v. LaVallee*, 330 F.2d 303 (2nd Cir. 1964) (pre-*Carafas* case where subject matter jurisdiction was not contested).

### CONCLUSION

For the reasons discussed above, the judgement of the Court of Appeals for the Ninth Circuit should be reversed and the matter remanded to the District Court for dismissal for lack of subject matter jurisdiction.

DATED This 16th day of December, 1988.

Respectfully submitted,  
**KENNETH O. EIKENBERRY**  
*Attorney General*

**JOHN M. JONES**  
*Assistant Attorney General*

**WILLIAM L. WILLIAMS**  
*Attorney of Record*  
*Senior Assistant Attorney General*

Correction Division  
Mail Stop: FZ-11  
Olympia, WA 98504  
(206) 586-1445